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Docket No. 81-2222

THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

DALE AND CAROL SWEATT

Petitioners

v.

PLUMBAGO MINING CORPORATION

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Counsel for Respondent:

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QUESTION PRESENTED

Will police conduct in violation of the Fourth Amendment be deterred if victims of theft are prevented from having full and complete access to civil proceedings against the thief because of that unlawful police conduct?

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76 Mich.L.Rev. 184 (1977) 18

STATEMENT OF THE CASE

In[1] October and November of 1980, the Maine State Police conducted a series of searches of the property of

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1 Respondent has prepared its own version of the Statement of the Case because the Petitioners' version is deficient. In particular Petitioner does not discuss the consent Judgment Respondent obtained securing the tourmaline. Likewise Petitioner makes mistatements of fact. He refers to "Plumbago's misconduct" and "illegality". Petition at 3 and 10. He also complains that the State Police were "manipulated" and that there was "concerted official and private misconduct". Petition at 7. No court has ever made a finding that Respondent has engaged in misconduct, manipulation or illegality; after all, Respondent merely reported a sizeable embezzlement of its property to the State Police and cooperated in the investigation by the State Police.

the Petitioners[2] and seized what Respondent has alleged to be in excess of $250,000 worth of its tourmaline. Tourmaline is a gem stone that is found in Newry, Maine, where the Respondent operates a mine. Petitioner Dale Sweatt was, in 1972, one of the discoverers of the mine, one of the original shareholders of the Respondent, and one of Respondent's employees from its inception until 1975.

Soon after the search the Petitioner filed a motion to suppress the tourmaline. The search was conducted

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[2] Only Petitioner Dale Sweatt is or has been a party to this case, Plumbago Mining Corp. v. Sweatt, now reported at 444 A.2d 361 (Me. 1982). Respondent does not cross petition from a decision adverse to it in the second appeal of State v. Sweatt, a companion case below. In that case both Mr. and Mrs. Sweatt were parties.

with a warrant based on affidavits prepared by the State Police; the affidavits were in part based on information provided by one of the officers of the Respondent.

While the motion to suppress was pending, Respondent brought the first of two civil actions against the Petitioner.[3] That action sought, by a statutory procedure entitled Forcible Entry of Personal Property, to recover the tourmaline that the

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[3] A chronological appendix which was part of Respondents Brief below is attached for the convenience of the Court.

Petitioner allegedly stole from the Respondent. See 14 MRSA §6012. A temporary restraining order was issued after notice and hearing. That order restrained the State Police from returning the tourmaline to the Petitioner.

The Respondent filed a second civil action against the Petitioner. This action sought $1,000,000 in damages for conversion of both the tourmaline that had been seized and other tourmaline which the Respondent alleged had already been sold by the Petitioner and converted into cash or other assets.

Petitioner's motion to suppress was granted and the State of Maine appealed. Two days after the oral argument in the Maine Supreme Judicial

Court on the State's appeal, the parties agreed to the entry of a consent judgment in the FED case. The crucial provision of that judgment read:

> 3. Defendants White and Ouellette [two State Policemen] have no right, title or interest in the property in question other than as custodians. They shall retain the property in question until any pending criminal proceedings involving defendants Sweatt or Austin have terminated in the Superior Court (initials omitted). If this civil action is pending at that time they shall continue to hold it until the entry of any Final Judgment.

Thereafter on March 31, 1981, the Maine Supreme Judicial Court affirmed the order of the Superior Court in the suppression case. Its decision turned

on the content of the affidavits supporting the search warrants. State v. Sweatt, 427 A.2d 940 (Me. 1981).[4]

After several hearings, the first on January 19, 1981, and the submission of numerous affidavits, on April 21, 1981, the Superior Court entered an order in the conversion case allowing the Respondent to attach up to $1,000,000 of the Petitioner's

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[4] This was the first appeal in State v. Sweatt. Thereafter Respondent sought, unsuccessfully, to intervene in that case on remand in order to prevent return of the tourmaline to the Sweatts. The second appeal in State v. Sweatt resulted in a holding that Respondent could not intervene. 444 A2d at 366-367.

assets.[5] On April 27, 1981, Respondent effectuated the attachment, by attaching the tourmaline which the State Police had earlier seized and which was still in the custody of the State Police.

On May 15, 1981, the Petitioner secured an order from the Superior Court vacating the consent judgment in the FED case and vacating that portion of the attachment effecting the tourmaline in the conversion case. The Superior Court did not write an opinion but its ruling left no doubt that it based its opinion

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5 Therefore, contrary to the assertions by Petitioner at 6 of his Brief, there was no violation of the rule requiring a pre-attachment hearing originally articulated by this Court in Fuentes v. Shevin, 407 U.S. 67 reh. denied 409 U.S. 902 (1972).

solely on the language of the mandate of the Maine Supreme Judicial Court in the first appeal of State v. Sweatt, supra.[6] Plumbago v. Sweatt, supra at 370.

Respondent appealed. The State Police returned the tourmaline to the petitioner.

Ultimately, the Respondent was successful on its appeal. Plumbago v. Sweatt, supra. The mandate of the Maine Supreme Judicial Court read as follows:

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[6] The mandate read in pertinent part, "Remanded for an entry of an order suppressing all property seized and directing its prompt return to the movants." 427 A.2d at 951.

> Remanded to Superior Court with instructions to vacate the order of May 15, 1981, to reinstate the attachment order dated April 17, 1981, and consent judgment order dated January 15, 1981; and to order defendant Dale Sweatt to return to Deputy Sheriff Stanley Fulton the property attached pursuant to the April 17, 1981 Superior Court Order.

Id. at 371.

Petitioner has failed to fully obey the Order requiring the return of the tourmaline. See Appendix B.

ARGUMENT

I. THE PETITION SHOULD BE DENIED BECAUSE THIS CASE IS OF LITTLE IMPORTANCE TO THE DEVELOPMENT OF THE LAW OF SEARCH AND SEIZURE.

There appear to be no reported cases in this Court or in any other addressing the specific question raised by this

case. Petitioner has cited none and Respondent's research has disclosed none. The closest cases on point in this Court are United States v. Janis, 428 U.S. 433, reh. denied 429 U.S. 874 (1976) and United States V. Calandra, 414 U.S. 338 (1974).

Those cases both support respondent's position: It should not be penalized because the state police prepared faulty affidavits and a state district court judge approved a search warrant based on those affidavits. Janis was relied on by the Court below. Plumbago v. Sweatt, supra at 369-370. As this case is sui generis there is no reason for this Court to grant the Petition and consider a question that is unlikely to be presented again.

II. PETITIONERS' ARGUMENTS ARE WITHOUT MERIT AND ARE FORECLOSED BY PRIOR OPINIONS OF THIS COURT.

The exclusionary rule prevents the admission of illegally seized evidence in a criminal prosecution. The most relevant Fourth Amendment law for this case is found in Janis and Calandra, supra. From those two cases one may establish the following principles. First, the primary, if not sole, purpose of the exclusionary rule is to deter unlawful police conduct. U.S. v. Janis, supra, at 446; U.S. v. Calandra, supra, at 347. Second, application of the exclusionary rule in a proceeding other than the prosecution for which the evidence was seized will depend on the result of a balancing test: The

deterrent effect of suppression in the non-criminal proceeding is balanced against the "societal costs imposed by the exclusion." U.S. v. Janis, supra, at 454.

The societal cost, if the rule is applied here, is the denial to an innocent civil plaintiff of pre-judgment security and no doubt, the use of critical evidence at trial. The deterrent effect of application is illusory. The state police have already been deterred by the decree in State v. Sweatt, 427 A2d 940 (Me. 1981).

In Calandra, this Court held that exclusion of wrongfully seized evidence would not be ordered in a grand jury proceeding investigating the defendant because

> it is unrealistic to assume that application of the [exclusionary] rule to grand jury proceedings would significantly further that goal [of deterring unlawful police conduct]. U.S. v. Calandra, supra at 351.

In Janis, the Court held that exclusion would not be ordered in a civil action brought by the federal government to collect unpaid taxes when the evidence in question had been seized by state officials to further a state prosecution for unlawful gambling.

> In short, we conclude that exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion. This Court, therefore, is not justified in so extending the exclusionary rule. U.S. . Janis, supra at 454.

The facts of Janis are somewhat similar to those here and its holding should apply here. Money and gambling paraphernalia were seized by the Los Angeles Police from Mr. Janis. The government was advised of possible tax consequences. The government made an assessment[7] against Mr. Janis and levied on the money. Janis moved to

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[7] Assessments are liens against the taxpayers' property from the time of the assessment. 26 USC §§6321 and 6322. Indeed, in other situations the same government that made the unlawful search has been allowed to assert a tax lien on the seized property or defeat a motion for its return. Field v. U.S., 263 F.2d 758, 760, 762 (5th Cir.), cert denied 360 U.S. 918 (1959); City of Boston v. Ditson, 348 NE2d 116, 125 (Mass. App. 1976), app. dis. 429 U.S. 1057 (1977). Ditson applied the Calandra balancing test in upholding a tax lien imposed as a result of an unlawful search. Id. at 123.

suppress in the Los Angeles Municipal Court; the motion was granted. The Municipal Court, noting the IRS lien on the money, did not order it returned.

Janis then filed a refund suit in the District Court and the IRS counterclaimed. During pretrial Janis moved to suppress the evidence the Los Angeles Police had seized -- which was the basis of the government's case -- and to quash the assessment. The motion was granted and that decision affirmed by the Ninth Circuit. Id. at 434-439. This Court reversed.[8]

In the course of its opinion this

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[8] Although not discussed, it seems clear that the Order quashing the assessment was also reversed.

Court took note of (but did not resolve) the problem of "intrasovereign" violations. Id. at 456.[9] Such a problem might arise here if the State, relying on the tourmaline that was unlawfully seized by the State Police, sought to recover unpaid income taxes from Mr. Sweatt.

In Janis there was no discussion of the likely result if a private party took the place of the other sovereign there occupied by the IRS: that is the situation in this case. Thus, the

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[9] This Court looked to cases like State v. Caron, 334 A.2d 495 (Me. 1975) where the Court below, using the Calandra balancing test, did not apply the exclusionary rule in probation revocation proceedings. U. S. v. Janis, 428 U.S. 433, 456 (1976).

question at issue is whether the release of the tourmaline from attachment and the consent Judgment, will deter the state police from preparing and State court judges from approving search warrants based on insufficient affidavits.

The answer to that question is "No". The Maine Supreme Judicial Court was correct in ruling as it did. But if the Court below was wrong then a private citizen faced with a theft of the magnitude alleged here and any likelihood of a civil recovery from the thief will never go to the police for fear "the constable will blunder" and, as a result, he or she will be unable to recover their property. Since the answer to the question presented is

"no", the Court below was correct.

The case on which Petitioner most heavily relies here, and on which he relied in the courts below, is Boyd v. United States, 116 U.S. 616 (1886). Petition at 9. Respondent found and still finds that reliance astonishing as Boyd was overruled sub silentio by this Court in 1975. Fisher v. United States, 425 U.S. 391, 407 (1976).[10] Note, The Life and Times of Boyd v. United States (1886-1976), 76 Mich.L.Rev. 184, 203-212 (1977).

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[10] On page 5 of his petition, the Petitioner argues that he has no remedy for the unlawful search and seizure. He already has had his remedy. The evidence has been suppressed and he was neither prosecuted nor convicted.

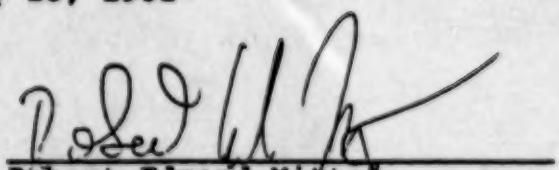
Unlawfully seized evidence is subject to assessment of a lien and is admissible in civil proceedings, Janis; it is admissible in grand jury proceedings, Calandra; it is admissible in probation revocation proceedings, Caron; and it is admissible for some impeachment purposes in the very trial for which it was seized, United States v. Havens, 446 U.S. 620, reh. denied 448 U.S. 911 (1980). The Maine Supreme Judicial Court correctly interpreted the precedent of this Court.

CONCLUSION

For all of the above reasons, the Petition for a Writ of Certiorari to the

Supreme Judicial Court of Maine should be denied.

Dated: July 23, 1982



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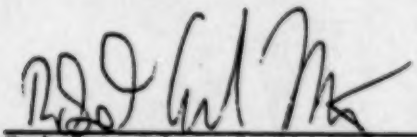
CERTIFICATE OF SERVICE

I, Robert Edmond Mittel, attorney for Respondent, hereby certify that three copies of Respondent's Brief in Opposition to Petition for a Writ of Certiorari have been mailed, this date, postage prepaid, first class mail, to Arthur L. LaFrance, attorney for Petitioners.

Dated: July 23, 1982



Robert Edmond Mittel

APPENDIX A

CHRONOLOGY

DATE	EVENT PLEADING OR ORDER	CASE	COURT AND DOCKET NO.
Nov. 14, 1980	First day of Suppression Hearing	Suppression	Ox. Crim. 80-291
Nov. 20, 1980	Complaint filed; motion for TRO heard and granted - State Police to hold tourmaline until conclusion of "this proceeding"	FED	Dist. XII, Cv. 79-80-C288
Nov. 21, 1980	Second day of suppression hearing	Suppression	Ox. Crim. 80-291
Nov. 26, 1980	Suppression ordered	Suppression	Ox. Crim. 80-291
Dec. 15, 1980	Complaint filed	Conversion	Ox. Civ. 80-204
Jan. 12, 1981	Oral argument	Suppression	Law Ct. Ox. 80-23
Jan. 15, 1981	Consent Judgment	FED	Dist. XII Cv. 79-80 C288
Jan. 19, 1981	Hearing on Attachment Motion	Conversion	Ox. Civ. 80-204
Feb. 17, 1981	Motion for attachment Granted	Conversion	Ox. Civ. 80-204
Feb. 18, 1981	Verified Answer of Defendant Filed	Conversion	Ox. Civ. 80-204
Feb. 26, 1981	Case Entered in Superior Court	FED	Ox. Civ. 81-35
Mar 2, 1981	Entry of $1,000,000 Attachment Order of February 27	Conversion	Ox. Civ. 80-204
Mar. 12, 1981	Defendant Moves to Stay Attachment	Conversion	Ox. Civ. 80-204
Mar. 23, 1981	Order reducing Attachment to $250,000 etc.	Conversion	Ox. Civ. 80-204

DATE	EVENT PLEADING OR ORDER	CASE	COURT AND DOCKET NO.
Mar. 31, 1981	Law Court Mandate Entered	Suppression	Ox. Crim. 80-291
April 13, 1981	Plumbago Motion to Intervene Filed; Notice of Appeal Filed	Suppression	Ox. Crim. 80-291
April 16, 1981	State Motion for Rehearing Heard	Suppression	Law Ct. Ox. 80-23
April 21, 1981	Order Reinstating Attachment at $1,000,000 Entered	Conversion	Ox. Civ. 80-204
April 21, 1981	State Motion for Rehearing Denied	Suppression	Law Ct. Ox. 80-23
April 27, 1981	Tourmaline Attached	Conversion	Ox. Civ. 80-204
April 28, 1981	Tourmaline to be Returned; Order limited to Suppression Case	Suppression	Ox. Crim. 80-291
April 29, 1981	Plumbago Motion For Stay and To Intervene Denied	Suppression	Ox. Crim. 80-291
May 4, 1981	Defendant's Motion to Release Attachment Filed	Conversion	Ox. Civ. 80-204
May 4, 1981	Defendant's Motion to Dissolve TRO Filed	FED	Ox. Civ. 81-35
May 5, 1981	Plumbago Notice of Appeal Filed	Suppression	Ox. Crim. 80-291
May 15, 1981	Hearing held on Defendant's Motions re TRO and Attachment; Entry of Order Vacating TRO, Consent Judgment and Releasing Tourmaline From Attachment and Enforcing Suppression Mandate; Plumbago Motion for Stay Denied	Conversion, FED Suppression	Ox. Civ. 80-204 Ox. Civ. 81-35 Ox. Crim. 80-291

DATE	EVENT PLEADING OR ORDER	CASE	COURT AND DOCKET NO.
May 18, 1981	Hearing on Plumbago Motion for Stay of May 15 Order in Conversion and FED Cases	Conversion FED	Law Docket Law 81-203
May 19, 1981	Plumbago Notices of Appeal Filed	Conversion FED	Ox. Civ. 80-204 Ox. Civ. 81-35
May 19, 1981	Tourmaline Removed From Eagle Savings	Conversion FED Suppression	Ox. Civ. 80-204 Ox. Civ. 81-35 Ox. Crim. 80-291
May 22, 1981	May 15 Superior Court Orders Stayed	Conversion FED	Law Docket Law 81-203

APPENDIX B

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May 26, 1982

Hon. Louis Scolnik
Justice, Superior Court
Androscoggin County Courthouse
Turner Street
Auburn, Maine

Re: Plumbago Mining Corp. v. Dale Sweatt, et als
Civil Action Docket Nos. 80-204 and 81-35

Your Honor:

This is a joint report that counsel have prepared on the return of the tourmaline in the above-captioned cases. Each item in each inventory prepared at the time of the seizure by the State Police was retrieved from a box or a bag, tentatively identified by Officer Maurice Ouellette, and given a new lot number. The lot was then photographed and a description prepared by the photographer who appears to be knowledgeable in the gem business.

As was indicated to Your Honor during our telephone conference on Monday, certain items inventoried by the State Police as returned to Mr. Sweatt on May 19, 1981, were not returned. Those items appear to be the following:

1. Items 2 - 9, 12 - 19 and 21 - 24 of the "Lampost Inventory";

2. Portions of "Evidence marked #1" of the Austin Office inventory;

3. Portions or all of "Evidence marked #2" of the Austin inventory; and

4. Portions or all of "Evidence marked #3" of the Austin inventory.

It should also be noted that the last inventory that we reviewed was the inventory of 10/9/80 from Dale Sweatt's office. We had insufficient time to do a detailed count, but it appears that all items A-1 through A-8 are present.

The material is in two footlockers in the vault at the Maine National Bank and should be attached within the next day or so.

Sincerely yours,

Robert Edmond Mittel
Attorney for Plaintiff

Howard H. Dana, Jr.
Attorney for Defendant Sweatt

prm